UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CAROL BARTON	)	
	)	
vs	)	Case No. 3:20-cv-00118
	)	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE	)	

- -

BEFORE THE HONORABLE

WILLIAM L. CAMPBELL, JR., DISTRICT JUDGE

TRANSCRIPT OF PROCEEDINGS

November 10, 2022

Volume 3

- -

Patricia A. Jennings, RMR, CRR
Official Court Reporter
719 Church Street, Suite 2300
Nashville, TN 37203
patty_jennings@tnmd.uscourts.gov

APPEARANCES:

For the Plaintiff:

Heather M. Collins
Ashley S. Walter
HMC Civil Rights Law, PLLC
7000 Executive Center Drive
Suite 320
Brentwood, TN 37027

For the Defendant:

J. Brooks Fox
Kelli F. Woodward
Benjamin Andrew Puckett
Metropolitan Legal Department
P.O. Box 196300
Nashville, TN 37219

I N D E X

The above-styled cause came to be heard on November 10, 2022, at 10:00 a.m., before the Honorable William L. Campbell, Jr., District Judge, when the following proceedings were had, to-wit:

THE COURT: All right, good morning. You-all are probably wondering when our 9:15 charge conference is going to start. Apologize for the delay. We continued to try to noodle on this and get to the right place, and in the midst of that, our copy machine decided it needed a break.

All right, before we get to the substance of the charge on the three substantive counts, we made a minor tweak to the verdict form. And that was we just simply emphasized a couple of words in the guidepost instructions after question three so that they understood that if they answered "yes" to any of the first three, they should go to question four. If they answered "no" to all, then they need to sign the verdict form, and that's the end of it. So hopefully that will be very clear to them, but no other substantive changes to the verdict form.

In terms of the charge, there was an issue raised yesterday about whether the first substantive jury charge, which is for religious discrimination, should be in there. I've gone back and looked at the history of the case. Suffice it to say, a charge conference, especially after all

the proof is in, is probably not the ideal place to raise a question about whether a claim is in the case or not. There's been plenty of time to sort that out before we got to trial.

The original complaint file does have a paragraph 11 -- well, let me back up because we talked about a couple of complaints. My understanding is that there was really just one amended complaint. It was filed at two different docket entries, something to do with Judge Newbern's handling of the request to amend. And so it ended up -- the same document ended up with two different docket numbers, I think is what we figured out.

MR. FOX: That's right.

THE COURT: Yeah. So I'm going off of Docket 19, which I think is the same as Docket 14, and I think that that amendment was really as to a proper party and not necessarily the substance of the claim.

Is that a fair summary of the amendment process?

MS. COLLINS: Yes, Your Honor.

THE COURT: Okay. Paragraph 11 references a discriminatory policy. The heading of Count One is Religious Discrimination. There was a motion to dismiss filed, but it wasn't as to the merits of the claim. Then there was an answer filed. And then there was subsequently a motion for summary judgment that sought summary judgment against the

plaintiff on a failure to accommodate -- provide religious accommodation and retaliation claim, but not as to a discrimination claim.

The plaintiff, in response to that, pointed out that there's also a religious discrimination claim. The defendant raised that issue -- or addressed that issue in the reply, but there was no motion before the Court as to that claim, nor was there one after. Then the pretrial order that supplants the pleadings did say that Metro -- that Ms. Barton -- and this is in the theory of the case -- was discriminated and retaliated against. Then in the statement of the issues, the plaintiff stated the issues for trial is whether Metro discriminated against and failed to accommodate. That was filed jointly on October the 24th. There was also around the same time a proposed jury instruction by the plaintiff on a religious discrimination claim that was distinct from its failure to accommodate claim.

And so all along the way, there was no motion to dismiss, there was no motion for summary judgment, there was no motion for more definite statement. This all could have been cleaned up a long time ago. And on top of that, I understand that Metro exercised their discretion not to depose the plaintiff. It's your choice whether to depose somebody or not, but certainly the nature of her claims could

have been fleshed out at a deposition.

So I think that charging the instruction -- charging the jury, rather, on a religious discrimination claim, that while not -- perhaps not pleaded in great detail, certainly satisfied the notice pleading requirements. And nobody's challenged that. Nobody's asked for a more definite statement or anything along those lines. So I think we're left with that claim in the case.

The instruction that we've given you is the pattern instruction on a religious discrimination claim. It doesn't include all of the back and forth of the McDonnell Douglas burden shifting because the Sixth Circuit has said that's not what the jury is really tasked with doing as clearly as what would be the case in summary judgment briefing. So we have included the pattern instruction, which is the Federal Jury Pattern Instruction Section 171:20. And that's the 6th Edition. We've combined a few sentences for readability, but for the most part, that's the pattern instruction that we intend to give on the religious discrimination claim.

I understand that Metro has an objection to this charge being given at all. That objection is noted. But as far as the substance of the charge, it's right out of the patterns. And generally the patterns are viewed as proper instructions, otherwise we wouldn't have them.

Any concerns with this pattern instruction on the religious discrimination claim from the plaintiff?

MS. COLLINS: No, Your Honor.

THE COURT: All right. From the defendant?

MR. PUCKETT: Your Honor, Metro would take the position that it's plaintiff's burden to prove intentional discrimination throughout the trial. So understanding that we've sort of moved past that prima facie stage of summary judgment, Metro would still prefer an instruction on legitimate nondiscriminatory reasons and pretext given that that is a part of the burden, and it's also Metro's right to assert that as an affirmative defense.

THE COURT: Well, the Sixth Circuit in *Beard versus AAA of Michigan*, 593 Fed. App'x 447, a 2014 case -- this is reviewing a proposed jury instruction that was given for abuse of discretion standard -- said (as read): The proposed instruction each referred to aspects of McDonnell Douglas burden-shifting framework instructing the jury to examine the employer's legitimate nondiscriminatory reasons for pretext and informing the jury that a more favorable treatment of a similarly-situated individual creates an inference of discriminatory animus. As the Court has discussed, it is normally inappropriate to instruct the jury on the McDonnell Douglas analysis.

Do you have a more recent authority where the

Sixth Circuit panel has said that the McDonnell Douglas analysis should be part of an instruction? I know you-all didn't provide an instruction because you were sort of taking the position that this wasn't even a claim, but do you have anything contrary to *Beard*?

MR. PUCKETT: You read my mind, Your Honor. And, no, we don't have any case that's contrary.

THE COURT: Okay. Other than the request for a completely different instruction, the one in front of you, are there any objections to the wording of that instruction out of the patterns?

MR. PUCKETT: Beyond Metro's request to include those other instructions that -- no objections.

THE COURT: All right, the Religious Accommodation, the issue yesterday on this instruction was the third element that was raised on the phrase "discharged or disciplined." And the case cited was the *Kemp* case, I believe, which -- *Reed*. Not *Kemp*, *Reed* -- which didn't quite stand for such a clear proposition. And there's been one other court of appeals opinion that we found that relied on it. There have been district court opinions that relied on it for the proposition that the element is, as Metro has suggested, discharged or disciplined. The *Reed* case itself relied on *Tepper versus Potter*, which was a Sixth Circuit 2007 case, 505 F.3d 508, that looked at this issue.

Tepper is actually referred to more by subsequent courts than is *Reed*. And those courts have followed that, what they believe is the instruction and the standard given in *Tepper*, which is discharged or disciplined. It says (as read): The third prong of the prima facie case is whether *Tepper* can demonstrate that he has been discharged or disciplined. And then it goes on to talk about the Supreme Court opinion and *Ansonia Board of Education versus Philbrook*, 479 US 60, which is a 1986 case.

And so looking at those, I think that the instruction that we have come up with on that third element would be proper under existing Sixth Circuit law. So let me hear -- that's the reason for that change. I've kind of given you my thinking. The other change we made was adding more about the undue burden defense. We still shied away from the phrase de minimis, but I think we got the same concept in there, which is that Metro has proven that it was unable to allow Ms. Barton to attend a religious observance without undue hardship, and then instead of saying de minimis impact and then defining de minimis and then defining what de minimis isn't, we skipped those two middle steps and just went right to what is an undue hardship. And that's that extra small paragraph at the end of that instruction. That's how we got there.

So from the plaintiff, on this charge on Religious

Accommodation, are there any objections to the proposed charge?

MS. COLLINS: Yes, Your Honor.

THE COURT: And what are those objections?

MS. COLLINS: Under *Reed* -- *Reed* was a motion for summary judgment case, that obviously you noted that those were the prima facie elements. The Supreme Court has said in *Swierkiewicz versus Sorema*, 534 US 506, 2002, that the precise requirements of a prima facie case can vary depending on the context, and they were never intended to be rigid, mechanized or ritualistic. And that's exactly what they're arguing in *Reed*.

Again, *Reed* was a summary judgment case. And that case did not specifically address whether it had to be discipline or that it had to be a discharge. The dissent made that argument in *Reed*, and the majority noted that. The dissent contended that the case was the first in our circuit to squarely present the question whether a plaintiff had to satisfy the prima facie case for a religious accommodation claim by showing an adverse action without showing discharge or discipline. And the majority said because we hold the specific accommodation *Reed* challenges here does not rise to the level of an adverse employment action, we are not presented with the issue.

So this --

THE COURT: What about *Tepper*, though? Because *Reed* relies on *Tepper*.

MS. COLLINS: Well, again, I think that the facts in *Tepper* fit that scenario, but if you go back to the Supreme Court's instruction for a prima facie case, that it's not supposed to be rigid or ritualistic -- which is what this is when you're putting it in a box that it doesn't belong in, and it preceded the *Burlington Northern* line of thought, which also goes into the *Deleon* case that you mentioned yesterday that does recognize that an adverse action can be much broader. It's not just a discipline. It's not just a discharge. And so I think that this can be a confusing instruction in that it is rigid. It's more geared towards summary judgment. But it doesn't recognize the facts of this case, which dealt with something different.

She was given a choice. So it doesn't fall neatly within the area of discipline. It doesn't fall neatly within the area of discharge. It falls in this broader category of adverse action. And I think that that needs to be reflected in the jury instruction to -- you know, even if we put in there transfer, or something broader than just this narrow definition of discipline or discharge. I just think that that's inappropriate. I think the facts in *Tepper*, if I'm not mistaken, and I don't have that in front of me, I think that they did deal with a discharge. I could be wrong, but I

think that that's what they did, that it did fit neatly within that box. This does not.

And so for that reason, I would object to *Reed* being incorporated into the instruction because really it's relying on an argument that was made in the dissent, and the majority did not pick it up. And, you know, sometimes when cases come after that, they rely on language that is just not appropriate to rely on, but it's not in this case.

Now -- do you want me to move on to the other argument, or do you want to think about that?

THE COURT: No, let's discuss that one.

MS. COLLINS: And, Your Honor, there was a subsequent Sixth Circuit case, it was an unreported case, *Mitchell versus University Medical Center*, 2011 US App Lexus 26546, and it clarified *Reed* to mean that discipline must at least rise to the level of an adverse employment action element of a discrimination claim, which I think is consistent with it being appropriate to instruct the jury on the broader language.

And *Mitchell* goes on to clarify that we have indicated that the discipline element of an accommodation must at least rise to the level of an adverse employment action element of a discrimination claim. And they went on to cite the various things, that it can include a significant change in an employment status, such as hiring, firing,

failing to promote, reassignment with significantly different responsibilities.

So we could use that language of "reassignment with significantly different responsibilities" if you thought it was appropriate to be more specific than just using the broad term "adverse employment action."

THE COURT: All right, defendant's response on that particular phrase?

MR. PUCKETT: Sure. Your Honor, I think the instruction is accurate, and the Court correctly noted that *Tepper* really is the line. *Reed* expanded on the logic. The *Reed* case quoting *Tepper* said (as read): In this circuit, it's settled that the analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination.

That's at page 579. It begins with the analysis of whether there's been intentional discrimination and then moves on to whether they've established a failure to accommodate. The last line of the case, again, extending the logic of *Tepper* says (as read): Because *Reed* has not shown any materially adverse employment action, much less discharge or discipline, his religious accommodation fails.

My colleague is correct to say that *Reed* doesn't directly address whether or not this element continues, but that's because they note the dissent, and they say, "Look, we

don't even have a materially adverse employment action here, so we certainly can't have discharge or discipline." So it's the first threshold that the plaintiff in *Reed* failed, not the additional requirement for a failure to accommodate claim of discharge or discipline.

THE COURT: What about her argument that elements of claims are not to be rigid and instead should be malleable to a particular case? And I think -- if I get this wrong, I'm sure Ms. Collins will tell me, but I think her argument is discharge and discipline are forms of adverse employment actions, and that's really what the elements in an employment case are aiming at. The use of those two words in this particular context isn't required in every case if it's a situation where you might not have something that technically qualifies as a discharge or even possibly a discipline, it could still be an adverse employment action. And so I think her proposal is to have some phrase added to this last element that would broaden it beyond discharge or discipline.

So what are your thoughts on that particular request?

MR. PUCKETT: Sure. I think the malleability of the elements is understandable, but at some point the malleability threads the integrity of the law. And I think the law here -- the accurate statement of the law here is that it requires a discharge or discipline. So moving

outside of those bounds, it may seem rigid, but in the end, the law requires some black and white definition. And we can't flex our jury instructions to conform with plaintiff's proof so that she's got a case. I think the law must apply. And here, *Tepper* is the law, *Reed* is the law.

When we say that discharge or discipline is just sort of another word for materially adverse employment action, I think that doesn't fit particularly with *Reed's* analysis where they say that they're distinct, right. We haven't reached an adverse employment action, so we're not even going to analyze whether or not the plaintiff was discharged or disciplined. That implies that those are separate and distinct sort of theories. They're separate and distinct analyses. So one cannot be the other. I think discharge and discipline is narrower than materially adverse -- I apologize, I keep struggling with that phrase -- materially adverse.

I think the case law, in general, in these Title VII cases will show that materially adverse has pretty broad meanings that go, you know, beyond discharge or discipline. Discharge or discipline are phrases that are intentionally used and used again and again in the Sixth Circuit with regard to failure to accommodate cases, and they hold a narrower meaning than anything that's materially adverse.

I think a good example of that would be the *Deleon* case, Your Honor, where that was an involuntary transfer. That's not discharge or discipline, but the Court in that case found that that was materially adverse. That wouldn't fit into failure to accommodate analysis, but it did work in the *Deleon* case, which was a separate theory of intentional discrimination.

THE COURT: So, in other words, Ms. Collins's argument as to some sort of adverse employment action is really subsumed in the discrimination claim, even though we don't really say that in that instruction because that just looks at the decisions made, as opposed to -- well, no, we do say adversely affected.

MR. PUCKETT: Right. And that's --

THE COURT: I'm sorry, you're right.

MR. PUCKETT: I'm sorry to interrupt.

THE COURT: No, I'm correcting myself. I missed that. And so your position is that *Reed* -- any distinction made in the cases differentiates adverse employment action in the discrimination context and carves out a narrower elements for an accommodation claim?

MR. PUCKETT: That's correct, Your Honor.

THE COURT: Okay. Well -- okay. I'm going to leave that element as it is. And as I look further at *Tepper* -- and it went on to talk about the *Ansonia Board of*

Education case. And it said (as read): However, more than loss of pay is required to demonstrate discipline or discharge. Then it quotes the *Ansonia Board* case. And the conclusion was *Tepper* -- in this case, the facts related to the payment for time he didn't work. (As read:) Said Tepper is simply not being paid for the time he does not work. He has not been disciplined or discharged.

I think *Tepper* was pretty clear that that was the standard. Another panel may come along in this or some other case and say that's not right, but I think right now that's the authority to follow. So I'm going to keep that element as it is.

Then on the undue burden, which we've tweaked a bit, are there any objections to that handling of the undue burden and trying to explain what that is and is not from the plaintiff?

MS. COLLINS: Yes.

THE COURT: Okay, what's your objection?

MS. COLLINS: The language where it says (as read): If the request were to cause anything more than an insignificant trifling or negligible effect on the employer's business, then it is considered an undue burden, I think that that's a pretty steep hill to climb.

The language that *Trans World* last noted was that it was related to cost. I don't believe that language was in

Trans World, but maybe that's where you got it from.

THE COURT: No, I think we got it from -- we were merging some proposed instructions on undue burden and de minimis with the idea of avoiding inserting a phrase in, i.e. de minimis, and then having to explain it and explain what it wasn't. That seemed to me to be unnecessary, that we could get to the same point without all those steps. And I think that the authority cited by the defendant in its pattern instructions on this --

MS. COLLINS: Well, also, I don't think that engaging in acts of speculation is enough to deny someone an accommodation. In *Arlington Transit Mix, Inc.*, 957 F.2d 2019, I believe that was a Sixth Circuit case from -- I have to look that up, what year it was, but the Sixth Circuit said (as read): After failing to pursue this or any other reasonable accommodation, the company's in no position to argue that it was unable to accommodate reasonably his religious needs without an undue hardship on the conduct of its business.

And what happened in that case was that the company instituted a policy, and the policy effectively roadblocked the accommodation that the employee had received for a number of years. And by doing so, that amounted to -- they said you can't argue that it would be an undue hardship when you create the hardship. So I think that the language

needs to be tweaked to be not so heavily weighted on the employer side to not recognize the fact that if you create the hardship, which is what happened in this case, it's not -- it's not undue. It's not an undue hardship because you don't even get to that point when you -- when you create that.

THE COURT: But, I mean, if this is a correct statement of the law, you still have that argument. You can still say to the jury, hopefully in the next hour or so, they created this mess, I mean, I think is what you're basically saying. But isn't that a correct statement of what undue hardship is? And there's no dispute that that's a defense; right? It's a cognizable defense to this claim.

MS. COLLINS: It's a defense.

THE COURT: Right.

MS. COLLINS: But if the jury latches onto this very specific language, then it's a problem because it doesn't address the argument that I would make -- it doesn't specifically say in here -- and I know how -- I had this experience with juries before, where they look at these instructions, and they break them apart, and no matter what argument I make, if I say that, you know, they created this mess, so none of this matters, they're going to go back to the instruction. So whatever I argue won't matter if we don't have some sort of instruction to counterbalance that.

THE COURT: That's what I told them on Tuesday morning, "If what they say on the law" -- and I'm about to tell them again -- "conflicts with what I say about the law, listen to me."

MS. COLLINS: Exactly.

THE COURT: And, I mean, that's why we give them the instruction in the first place, so they have something to anchor their deliberations on.

MS. COLLINS: Right. And that's why we need to get the instruction correct. And I think that, while this is an isolation, it can be considered a correct statement of law. If you don't extend that to show that what's written about in *Arlington*, that if an employer creates the problem, or if they create the hardship, then they can't -- then it's not a viable defense because that's exactly what *Arlington* stated.

THE COURT: Right, but in that case, if -- I haven't read it, but taking your characterization of it, then that -- the policy change seemed to have been aimed at a particular accommodation that was already being given; right?

MS. COLLINS: Yes.

THE COURT: That's not what this case involves. I mean, nobody implemented the policy clairvoyantly to know that Ms. Barton might get selected as a delegate to go to Sri Lanka; right?

MS. COLLINS: That is correct, but that doesn't mean -- just because the first time that it came up with Ms. Barton doesn't mean that it was a correct policy in the first place. I mean, it's like in the ADA context. If you have a hundred percent heal policy saying an employee has to be a hundred percent healed before they come back to work, you're going to exclude a whole swath of employees, and you're going to totally miss the opportunity under the ADA to engage in that reasonable accommodation conversation to figure out whether or not they could work. This is the same premise in that, you know, they have a very exclusionary policy, and who knows who it's going to affect until it comes up.

THE COURT: But, I mean, my point, though, is you're arguing for expansion of this charge on the premise that the policy was implemented for some purpose relating to Ms. Barton's request for an accommodation. And I just don't think that's -- I mean, I think you certainly have facts in the record where you can argue that it wouldn't have been an undue hardship if they would have just engaged and done X, Y or Z, they could have avoided this, and they didn't, they didn't do anything, I mean, whatever you're going to argue. My main concern is, is this a correct, complete and accurate statement of, in particular, this defense.

MS. COLLINS: No. It doesn't clarify that it's

Metro's burden.

THE COURT: Well, it says that Metro has proven.

MS. COLLINS: No, down in the last paragraph is what I'm referring to. (As read:) If an accommodation request from an employee were to cause anything more than an insignificant, trifling or negligible effect on the employer's business, then it is considered an undue burden.

That's Metro's burden.

THE COURT: Right. Right above that, we've said (as read): Unless you determine that Metro has proven that it was unable to allow Ms. Barton to attend a religious observance without undue hardship on Metro's operations.

And the next sentence is just an explanation of what is an undue hardship and what is it not. (As read:) If an accommodation request from an employee were to cause anything other than an insignificant, trifling or negligible effect on an employer's business, then it's considered an undue burden.

That's just defining what an undue burden is and is not.

MS. COLLINS: Sure. Well --

THE COURT: We've already said it's their burden.

MS. COLLINS: Well, I think that it might be a little bit clearer if undue hardship and undue burden -- if there was consistent language. If it said undue hardship up

at the top, and then it should say undue hardship in that second paragraph.

MR. PUCKETT: I was going to bring that up myself.

THE COURT: That's fine. I can change the last one to just say hardship, and we're consistent in both places.

Okay. Anything else on this instruction?

MS. COLLINS: I just would like to state for the record we do object to the language of discipline or discharge.

THE COURT: Okay.

MR. PUCKETT: Your Honor, we just agree with everything you said, obviously, and a few things that opposing counsel said. I do think it's an undue burden, but I think that's the burden. And I do think it's an accurate statement of law, which I agree with opposing counsel when she said that. So beyond that, I think the definition is accurate.

THE COURT: All right, let's go to Retaliation. This, too, is a pattern, at least the first part of it is, up through the elements from 3(c) Federal Jury Practice Instruction, Section 171.25. The last paragraph concerning explanation of the fourth element, which is really the but for language you-all requested yesterday. I don't know if we fleshed it out as much as you were requesting, but -- and

that's based on *Bostock versus Clayton County, Georgia*, 140 Supreme Court 1731, which is a 2020 case.

All right, any objections to this Retaliation instruction?

MS. COLLINS: Yes, Your Honor, just that we'd request that the "but for" be fleshed out consistent with *Bostock*.

THE COURT: Go ahead.

MR. PUCKETT: Your Honor, I think this instruction is consistent with *Bostock*. There certainly could be more words, but I'm not sure that the point of this instruction and *Bostock* are different in any way.

THE COURT: What is it you think we should add to this, Ms. Collins?

MS. COLLINS: In plaintiff's proposed set --

THE COURT: Okay, hold on, let me get to that --

MS. COLLINS: Sure.

THE COURT: -- because I've got 38 binders up here.

MS. COLLINS: Understandable.

THE COURT: Plaintiff's proposed instructions on Retaliation?

MS. COLLINS: Yes, Your Honor.

THE COURT: Okay. Go ahead.

MS. COLLINS: Is that probably just the last

clause of the last sentence, the "but for" standard, which simply means that a defendant cannot avoid liability just by citing some other factor that contributed to the decision. That was taken from *Bostock*.

THE COURT: So you want to just add beginning with a "but for" standard on that last sentence of your proposed instruction through the end of the sentence?

MS. COLLINS: Yes.

THE COURT: Any concern from Metro on that?

MR. PUCKETT: From our perspective, Your Honor, that's covered in the first sentence here, Ms. Barton does not have to prove that unlawful -- I'm sorry. Maybe that wording needs to be shuffled a little bit, in any event.

THE COURT: I mean, what if we just add --

MR. PUCKETT: You need not find that the only reason for -- that was the only reason for Metro's decision.

THE COURT: I'm going to include that last sentence. I think it's -- I mean, it is a little extra language. I think it gives the jury a little bit more clarification if they're not quite sure what the "but for" standard is. So what we'll add to this is -- at the end of this instruction, it ends with "a religious accommodation, period." We're going to add: A, quote, but for, closed quote, standard simply means a defendant cannot avoid liability just by citing some other factor that contributed

to its decision, period, and that will end that instruction.

That also may give them a little more clarity, but also may short-circuit some questions. We had an employment case a couple of weeks ago where we got a lot of questions about what words mean in instructions. It was an ADA case, which has some pretty unique terms that are used, but -- so I will add that.

All right, any other -- so those are the three substantive instructions. Any other objections to the instruction before we go print a clean copy, other than the objections that have been noted by both sides? Those are preserved.

MS. COLLINS: No, not from the plaintiff, Your Honor.

MR. PUCKETT: Your Honor, we do have one suggestion for the Retaliation instruction. And I think there may be some grammatical stuff we can clean up. I've taken an amateur's turn at drafting these jury instructions, so I know that they're crafted and shuffled, and sometimes the words get a little broken apart. So the sentence I was just trying to read, neither my brain isn't working correctly, but it's the bottom paragraph on page 6.

(As read:) For the fourth element, Ms. Barton does not have to prove that unlawful retaliation you need not find that the only reason --

THE COURT: Yeah. No, that's a typo.

MR. PUCKETT: Yeah. In No. 4, it says "The Metro." I think maybe we just drop the "The."

THE COURT: Right.

MR. PUCKETT: This is nitpicky stuff, Your Honor.

THE COURT: No, that's fair. We can have a million sets of eyes on these, and there will still be typos that we don't catch. So . . .

MR. PUCKETT: The last one, Your Honor, is an objection. I think the Sixth Circuit is not clear on this law. So I think -- we've raised this point before in summary judgment and I think in our Rule 50, but with regard to that first element, the request for religious accommodation, the law that supports a request for accommodation being a protected activity is ADA specific. The Eighth Circuit has addressed Title VII requests for accommodation, specifically in the oppositional clause retaliation context. We think that court has the right of it, Your Honor.

We think that in order to maintain an oppositional class retaliation claim, there must be some opposition. And so inserting the words that we have in our proposed jury instructions that plaintiff opposed an activity made illegal by Title VII is more accurate to what an oppositional clause retaliation claim consists of.

THE COURT: And we looked at that. The statute,

which is 42 USC Section 2000e-3(a) -- not necessarily the -- says (as read): Title VII prohibits discrimination in the workplace and also prohibits an employer from taking any retaliatory action against an employee because the employee, one -- I'm inserting the numbering, but this is how I read it -- one, has asserted rights, or two, made complaints under those laws.

So, I mean, there's the -- I don't think it's all oppositional conduct. And I think you can get into pretty theoretical discussions. Religious accommodation cases are a little bit unique in the sense of Title VII, I think every other protected category is more of an immutable trait, you know, race, gender, that sort of thing. Religion, of course, would be harder to say that about. I guess you could in some circumstances, but for the most part -- and I think that's why sometimes there's a little bit of different treatment of that because it's more belief conduct related -- things that are protected, as opposed to immutable characteristics.

Your objection is noted, but I think this is a correct statement, at least based on that pattern instruction.

All right, anything else?

MR. PUCKETT: Moment to confer, Your Honor?

THE COURT: Yes.

MR. PUCKETT: Nothing else.

THE COURT: Okay. All right, if you'll give us ten minutes, we're going to try to get you clean instructions for you to have if you care to use them in closings, and we'll come back at top of the hour.

Yes, sir.

MR. PUCKETT: A quick point. We did want to take a moment to renew our Rule 50. We can do that now or whenever you're --

THE COURT: No, go ahead.

MR. PUCKETT: You want me to move to the podium?

THE COURT: No, just state what you need to say.

MR. PUCKETT: Only a few brief additions just addressing some of the cases that Your Honor included. So we would like to incorporate by reference all the argument that we previously made.

With regard to the *Deleon* case, as I said, I looked into that case, Your Honor. This is in a failure to accommodate context. And I think where we came down on the jury instruction may also form our motion for a directed verdict. The *Deleon* case, again, was not a failure to accommodate case. That Court found that an involuntary transfer was materially adverse. It wasn't addressed in the majority opinion, but in the dissent, I believe it was Judge Sutton said that a voluntary transfer -- sort of by comparison, a voluntary transfer is not materially adverse.

So under that reasoning, even under *Deleon*, we don't -- we haven't reached a materially adverse action in that transfer that was taken on voluntarily by Ms. Barton.

Now, I understand her argument that she felt as if she had no other choice, but that may be an intrinsic feeling, rather than -- the Court in *Deleon* said that the plaintiff was instructed show up Monday -- you know, essentially, show up Monday here at the office in your new position, or you don't have a job. Those aren't the facts we have here. So we haven't even reached the materially adverse level yet.

And then, of course, where we came down on the *Reed* and the *Tepper* case is that failure to accommodate requires more, requires discharge or discipline. We certainly don't have those facts. I don't think plaintiff even testified that she was discharged or disciplined.

So renewing the previous argument on failure to accommodate, incorporating the case law that Your Honor cited, we would move for a directed verdict on that.

THE COURT: Okay.

MR. PUCKETT: With regard to retaliation, we had an opportunity to look at the *Veith* case, the *Veith v. Tyson Fresh Meats* case. This was Judge Richardson's. And I think Your Honor said he sort of wound that back or he backed off of his position that a retaliation claim can't be just a sort

of repackaging of a failure to accommodate, but specifically in the *Veith* case, what Judge Richardson found was it was distinguishable from his *Wyatt* opinion, where the plaintiff was saying these same actions that represent a failure to accommodate also represent retaliation. There, the Court found you can't -- you can't have it both ways. It's either one or the other.

In the *Veith* case, the plaintiff there was terminated after making a request for accommodation. The Court found that the failure to accommodate -- the denial of the accommodation represented a failure to accommodate. The termination was the retaliation. So there were two distinct acts that could be attributed to -- one, to failure to accommodate, the other to retaliation.

So just to distinguish *Veith* from *Wyatt* and renew that argument we made based on *Wyatt*, that here the facts are the same. Metro's decision not to allow the leave is the same materially adverse -- or, I'm sorry, the same decision that plaintiff relies on for both, failure to accommodate and for retaliation. That's just a repackaging. That's what the Court in *Wyatt* said you can't do.

THE COURT: Okay.

MR. PUCKETT: And, of course, as to the third claim, I'm not sure we directly addressed it in our initial motion, but we would again state that -- understanding

Your Honor's already ruled on this, but we'd again state that the complaint didn't have a distinct disparate treatment claim. We were under no notice. It wasn't addressed directly in our motion for summary judgment because defendant wasn't on notice that it was actually a claim.

THE COURT: But you didn't take her deposition.

MR. PUCKETT: We did not take her deposition.

THE COURT: Okay. That's where you lose me. You had the chance to put the plaintiff under oath and say "Tell me everything you know" -- I can't think of a single case when I was in private practice where I didn't take a deposition because that's your opportunity to figure out what their claim is and box them in, if you can. But go ahead. That's just my personal preference.

MR. PUCKETT: Understood, Your Honor. I think that concludes my argument on the third claim, but we just did want to make that note.

THE COURT: I understand.

MR. PUCKETT: Thank you, Your Honor.

THE COURT: All right. What are the distinct events here, Ms. Collins, that he's raised the issue of --

MS. COLLINS: Sure. I feel like we've already plowed the discipline ground pretty well. I disagree. He just highlighted why we should expand that language and explain it further, which I, in an odd sort of way,

appreciate. As far as *Wyatt*, they keep relying on *Wyatt* and Judge Richardson's opinion. That opinion was overturned by the Sixth Circuit and reversed. So --

THE COURT: On the grounds of that he got it wrong?

MS. COLLINS: Yes. Yes. And -- yes. Yes.

THE COURT: *Wyatt* was just, what, a year ago?

MS. COLLINS: It was reversed.

THE COURT: No, *Wyatt* was the earlier case. I'm sorry.

MS. COLLINS: Yes. It was reversed by the Sixth Circuit.

THE COURT: Well, maybe Judge Richardson learned something from his reversal.

MS. COLLINS: I'm sure that he did because when he ruled on *Veith*, which was my client, and when I briefed that -- so I'm quite familiar with the facts -- he did note both of the things, the failure to accommodate, as well as the termination, were adverse employment actions. And so I think -- I don't want to guess what Judge Richardson -- but he probably learned something from *Wyatt*, and I think that that's why he came down the way he did in *Veith*.

And so it certainly is an adverse employment action to consider the request for accommodation. It's not, you know, rolling it in or whatever.

THE COURT: But is there evidence in the record that you're pointing to, to say there's more than one event here?

MS. COLLINS: Yes.

THE COURT: If so, can you tell me what that is? We've already talked about the EEOC charge that I'm a little skeptical of because that really wasn't mentioned in anything, but . . .

MS. COLLINS: He mentioned -- I didn't write it down. I was too busy listening. He referred to that she made the decision to leave, neglecting the fact that prior to that, the supervisor -- I believe it was Ms. Few, wasn't it? -- the manager of the department said, "Well, maybe you should look for other jobs." So she's the one that initially said, "Hey, your request, Ms. Harris has already denied it, why don't you start looking for other jobs." She was doing what she was told. So I think that that definitely plays into the whole scenario. That preceded her just -- you know, they want to characterize it as her just making a choice to voluntarily leave. That wasn't the case at all. There was a lot of stuff that preceded that.

So I think that you could also consider that what I raised earlier in that this vacation freeze policy does not apply to Title VII. You can't freeze someone's Title VII rights. And that's essentially what they're trying to argue.

So that was another form of discrimination that certainly is underlying this whole thing that went on because they're relying on something and using it in a discriminatory way, the same way in *Abercrombie* that they used their policy that you couldn't wear head coverings that had the effect before it even happened of excluding people of a certain religious persuasion that wore things on their head. So I think it's the same sort of scenario here, and -- I think I've pretty much hit all the points that I can think of.

THE COURT: Okay. Well, a lot of the arguments are -- there's a few new ones raised, but a lot of them are restating the arguments raised on the original Rule 50 motion, and for the same reasons, I will just incorporate my ruling on those as to the same arguments.

In terms of the *Deleon* and the other cases about needing to be distinct actions, I think there's sufficient evidence that a jury could reasonably find that there were -- because there was a series of events. I don't know how counsel will package those in her closing, but I think there are enough facts there where one could say, well, this was -- even if you think the law is or should be that they're distinct events that have to be the basis for distinct claims, and it can't all be one or different legal theories arising out of the same event, I think there are sufficient facts here in the chain of events with the request for leave,

the denial, testimony about perhaps transferring or looking for another job, that, in and of itself, could be I guess argued as retaliation, and the denial of the claim -- or the request for vacation time could be the failure to reasonably accommodate. So I think a reasonable jury could segregate those and find that there's different bases for the claims, even if the law is such that that is what's required, and that's not entirely clear to me.

So for those reasons, I'll deny the motion.

All right. Are we ready to close the case?

MS. COLLINS: Yep.

THE COURT: Are you-all ready?

MR. FOX: Yes.

THE COURT: All right. Okay, what I plan to do is we'll get a clean copy of the final charge to you. My plan is -- you-all said ballpark half an hour a side on closings, maybe a little less than that, although lawyers sometimes underestimate how long they talk. If possible, I'd like to roll right into the charge from closings. If we get the sense people are needing a break, we'll certainly take one, but the charge will probably take about 25 to 30 minutes for me to give. That way we can get them back there, probably order them some lunch. Angie can get the exhibits gathered and back to her. And that way they'll have the whole afternoon to deliberate, as opposed to breaking it up and

having lunch and then coming back and doing the charge. I think I'd rather just get it to them, and I think they'd probably prefer that since they've been waiting here for almost two hours. So that's the plan.

MS. COLLINS: Sure. Are we going to have the charge for the closing?

THE COURT: Yeah, we're going to -- yeah, that's why we're going to take a break right now for us to get you that.

MS. COLLINS: Okay, great.

THE COURT: Do you want to reserve any time for a rebuttal on closing?

MS. COLLINS: Sure. Couple of minutes.

THE COURT: Okay. All right. I never quite know what lawyers mean by a couple or a few.

MS. COLLINS: Let's say three.

THE COURT: How many questions or minutes are in a few or a couple? They say "I just got a couple of questions for you," and then --

MS. COLLINS: I always think a couple is two, and several is three.

THE COURT: All right.

MS. COLLINS: So let's say several, meaning three.

THE COURT: Okay. I'm sure Ms. Barton and Ms. Few are sitting there the last part of yesterday and today

thinking this is how the sausage is made, and it's not a very fun process to watch, but, nonetheless, our charge will be what it will be, and if somebody has issues with it, I'm sure that they can raise that.

By the way, once I give the charge, right before I dismiss them, I will call -- you-all both have done this before -- I'll call one lawyer up a side, ask them if there's any objection to the charge given. You can just reassert your objections without going into them in detail. They'll be preserved. Mainly what I'm asking for there is did I read it wrong. And I've had that happen where it says "plaintiff," and I said "defendant." And that's a pretty important thing to correct. So if you catch that, that's the time to raise that, and then I'll clarify with the jury.

All right, let's plan on coming back at 11:15. We'll get you, as quickly as we can, the instruction.

(Recess taken from 11:00 a.m. to 11:22 a.m.)

THE COURT: All right, we ready for closings?

MS. COLLINS: Ready.

(The jury returned to the courtroom at 11:24 a.m.)

THE COURT: All right, be seated, please. Members of the jury, welcome back. I do apologize for the significant delay this morning. I can assure you we were making the best use of that time, but I also realize that you-all sat back in that room for a couple of hours.

Hopefully, you had the stuff you needed in terms of snacks, drinks and that sort of thing, but I apologize. We try to be respectful of your time, and sometimes things are just unavoidable. So . . .

Now that we got you back in here, we're going to hear closing arguments from counsel, and then I'll give you your instruction, and then you'll be ready to deliberate.

We'll begin with the plaintiff.

MS. COLLINS: All right, good morning, everyone. Well, I guess technically it's a little bit more like afternoon. Thank you, again, for waiting, and I just want to go over a few things, and then you'll get the case. In a moment, you're going to go to the jury room. You're going to deliberate, and you'll have three tasks.

The first is to answer the questions on the verdict form. And I'm going to go through that. Second, you're going to make sure everyone else in the room follows the law that the judge gives you. And finally, you'll be able to talk about the case. And you'll have the opportunity to explain to each other why you think the way you do about each question that's going to be presented.

So I'm going to go through just a few ways to think about those things, but you-all saw the evidence throughout the case. In some instances, you saw it multiple times. So I'm not going to put all those things back up on

the screen. You'll have them with you back in the jury room, and you'll be able to go through them again if you want to. So I'm not going to make you look at them. But what I will do is I'm going to go through some of the information, and I'm going to go through the jury instructions to give you food for thought to take back with you.

So the first claim that you're going to hear about in the jury instruction is the claim under Title VII titled Discrimination. And all you have to determine to decide that claim is whether her religious -- Ms. Barton's religious observance was a motivating factor in her transfer, meaning if her religious observance played any factor that motivated the decision. It doesn't have to be the sole factor. It doesn't have to be the primary factor. It's whether or not it was a factor.

So I'm going to take you to that in the jury instruction, and you'll find that at page 4 through 5 on the jury instruction. And the Court has explained it here. And it explains the different aspects of that, in particular, the part that I just went through. This is the standard that you look at, whether or not it was a motivating part in the decision in her move. And so you'll have that to consider back there.

And some of the things that I think that you can think about when you go back there and you consider that

aspect is the testimony by Ms. Harris. Ms. Harris testified that she treated Carol the same as someone taking a vacation to Florida, that she didn't even consider accommodation because of the vacation freeze. Ladies and gentlemen, those two words are the most problematic words in this entire case, vacation freeze.

They assumed that what Carol was asking for was a vacation. They made the wrong assumption. Carol was not asking for a vacation. Carol was doing something that was protected by law. Title VII doesn't protect vacations. Title VII protects your right to engage in your religion the way you need to. And that's what's at issue, not a vacation freeze. So they kept saying all along this is -- she couldn't go. It's a vacation freeze. It's a vacation freeze. Carol wasn't going on a vacation. Carol was upholding her faith obligations. And because they missed that from the get-go, that's where they messed up.

So I think it was telling when Ms. Harris also acknowledged she didn't even know, she didn't even know that she was supposed to consider Carol's request as a religious accommodation. She didn't know that. She was in HR. Carol knew. Carol knew her rights. She had been doing it every single year for 12 years. She knew. Her supervisor didn't know. It's also telling that Carol had been there longer than everybody else. Carol knew.

They talked a lot about, well -- a couple witnesses said, "Well, I delayed a vacation. I didn't go on vacation during the summertime." You can't delay your religion. You can't delay your religious rights. Certain things under certain religions fall under certain days. You can't just go back if you're Jewish and say, "Hey, can you move this holiday because it's inconvenient for my employer?" You can't go back because you're Muslim and say, "Hey, can you move this because it's inconvenient for my employer?" You can't go back because you're a Seventh Day Adventist and say, "Hey, can you move this?" You can't go back in many religions and just say, "Hey, I need you to move these things." Vacations can be moved. Religious observances cannot be moved. And that's what Carol was dealing with. But they acted like they minimized her religion. And they acted like it was a vacation. It wasn't.

She also admitted -- and I believe this was Ms. Few who admitted this. That's what I have in my notes. She agreed that we would not be here today if they had approved the religious accommodation. That is one hundred percent true. We wouldn't be here today. Carol would still be working in HR, in the job that she loved, and she would still be doing a great job.

So you ask, why was this vacation freeze not in the handbook? That's a great question. We heard many

excuses for that. The only real evidence we saw of that was that one piece of paper. We did hear evidence that there were supposedly emails, there were supposedly other memos, there were supposedly other documents. We didn't see any of those. And the absence of evidence is something that you can consider because I would hope that my government would be in the habit of preserving evidence.

Carol filed her EEOC charge, which you-all saw. I believe that was at Exhibit 22. She filed her EEOC charge within two months. And all she wanted was someone else not to suffer the same fate that she suffered. All she wanted was someone else to not be faced with the impossible choice that she was faced with. So they knew within months, hey, if you have all this evidence to show that this was a completely untenable situation, that this policy overrode your handbook, that this policy overrode everything else, show it to us. But they didn't have any of that.

There was also evidence and testimony that other people had exceptions to the vacation freeze. They mentioned FMLA and medical, two things covered under federal law. Why didn't they recognize her federal rights? She had the same federal rights as someone who needed to take medical leave. She had the same federal rights as someone who needed an ADA accommodation in the workplace. She had the same rights, and they treated her differently. They de-minimized her religion

and said basically it doesn't matter, said no. They should have given her religion the same consideration that it's due, that federal law requires. They didn't.

So I'm going to go back to some of the principles that I discussed at the beginning. An employer has a responsibility to be fair and not discriminate. Metro failed. An employer, especially HR, should know better. They failed at that. To have an HR person who supervises other people, who's responsible for other people's careers, livelihoods, at the end game, their retirement, to not know the law, to not know the responsibility, huge failure. That's a huge failure on their part.

One of the other principles that it's -- it makes sense if you can do something for one employee, you can do it for another. That's not what happened with Carol. She went to them and got "No." They talked to other people. They apparently talked to the person that she filled in for after she had already had to transfer out to the substitute department. That lady got to take leave. And Carol even came back after she was shoved out to continue to help out the HR Department. They didn't treat her the same. And fundamentally that's what this is about, is different treatment.

So you can also look at Exhibit No. 7 and Exhibit No. 18. Those are the hours that showed the time off other

employees took. It showed that it wasn't this strict, strict policy where nobody ever took any time off. And it showed cumulatively that some people took off more. Now, it is a little confusing because there was different testimony from each of the Metro witnesses. The co-workers seemed like they had an understanding that the policy was from April to the end of August, maybe even the first of September. That was Ms. Earnest that testified that way. That was Ms. Hawkins that testified that way. That was Mr. Perez that testified that way. And that was Ms. Barton that testified that way. The supervisors, Ms. Few and Ms. Harris, they tried to say, nope, it was just this little narrow time frame from that one and only email from 2017 that even exist -- that even shows that there's some kind of freeze in place. That's it.

So one of your jobs as the jury, you're the judges of credibility, and part of that is assessing who has the most to gain, who seemed defensive, who seemed argumentive. That's an issue for you guys, to remember how everybody came across on the witness stand. And one of the things that you can take into consideration is do they still work for Metro. That's, you know, a very relevant question.

The one witness, Ms. Earnest, who no longer works for Metro, we called her as a witness, asked her about the timing of the vacation freeze. She gave testimony. That was the one witness they didn't cross-examine, the one witness

they didn't have any questions for. So those are things you can consider.

So even though Carol notified them -- so how else do you know this is discrimination? Even though Carol notified them in January, they did nothing. They confirmed they did nothing. April, did nothing. Continued to do nothing until she had her back up against a wall, and she had to put in her letter of transfer. So this is an important issue because they're going to say, "Well" -- and you heard it. You heard the word over and over and over -- "it was a hardship. It was a hardship on us. We worked all these hours, stayed late, worked weekends."

Well, first of all, you're complaining about a problem you created. She told you in January what was going on. The minute she had her dates, she told you. You continued to put it on the back burner. You continued to treat her like somebody who's going on a beach trip to Florida, and you continued to ignore her. You didn't take any mitigating steps. You didn't do anything. But you're going to continue to point the finger at Carol Barton and say, "Well, Carol, this is all your fault. You shouldn't have done that. You shouldn't have gone and met the obligations of your faith," and then compared it to a beach trip.

That's a mess they created. With all due respect,

that's a mess they created. And they can't turn the tables on Carol and say, "Well, it's a hardship." I own a business. I know how that goes. Anybody who's a manager knows how that goes. People put in their vacation requests, and managers step up. They don't throw their employees under the bus and violate a federal law at the same time. That's what happened.

So they made the choice to be short-handed rather than bring your most experienced and knowledgeable person back to the office and have her get up to speed, which, by the way, brings us to the testimony of Christy Overstreet. And there's also a stipulation to this effect, which you'll have back in the back. Ms. Overstreet started after Carol would have been back. So the logical conclusion to that is why would you keep Carol out of work? Why would you not just bring back your person, who, by their own admission, was the most knowledgeable, experienced person, there longer than both of the supervisors, who could have hit the ground running her day back. Carol probably would have worked through the weekend and done everything she could, got five times the amount of work that Ms. Overstreet was still training.

So, again, they're complaining about this supposed hardship that they created. They created that by not knowing the law, by calling it a vacation, by bringing in somebody

who had to be trained, who they then had to take other people out of their work duties, train Ms. Overstreet, and then they're surprised they're working late at night and on the weekends. Well, of course you are. Of course you are. Kind of happens when you break the law. But there are downstream effects.

So those are things that you can consider. You can also look at Exhibit No. 10, Carol's email with the calendars. She laid it out for them. She did her usual thorough job laying it out. I'll be back by this date. This is the exact date I'll be back, well before they hired Ms. Overstreet. So they knew exactly what was going on. They knew the deal. Didn't talk to her. So that's one of the things that you can consider. It was their choice that created the hardship, not Carol's. Carol was just enforcing her rights.

Again, back to the principles. We talked about where other employees took time off, and we also know that vacation is not protected by Title VII. The religious observance in this case is. So there's just one conclusion to that first claim of discrimination.

Now we're going to move on to the accommodation claim. And this is where the Court's going to instruct you on whether or not someone holds a sincere religious belief. I don't think there's any doubt about that, but Carol talked

about how important her faith has been, not just as a Johnny come lately, her whole life. Kenn talked about that too. Several of the witnesses, several of the other employees acknowledged that they knew what Carol's faith was because she was very open about it. They knew that she had taken off other years. So, of course, this was a sincerely held belief. Metro was aware of the conflict. That's what I just went over a moment ago. They knew about the conflict in January. They just didn't do anything.

Ms. Barton was discharged or disciplined for failing to comply with the conflicting employment requirement. She's not in her job. So it meets that element. She was pushed out. And that satisfies the element. All of this is explained to you as far as the accommodation claim. One of the issues that I do want to touch on, it states (as read): If an accommodation request from an employee were to cause anything more than an insignificant, trifling, or negligible effect on the employer's business, then it is considered an undue hardship.

Now, it's important to note this is Metro's burden to show that undue hardship. What they can't do is what I was talking about a moment ago, is say, "Hey, looky here, we met this. It was insignificant and trifling to us to deal with Carol Barton's request." But when you create the mess, you can't rely on that. And that's what happened. They

created this mess. And so for them to say, "Oh, God, it was awful, hardship, hardship, hardship. I had to work late. I was away from my family. I worked long hours" -- again, January she told them. April, she gave them specific dates, gave them the calendars, let them know she would do everything she could to work it out. So this doesn't apply here. The elements have been met.

So then we go to the retaliation claim. And that's next. And I just want to go back to the accommodation claim. There are a couple of exhibits that I think apply to that. Exhibit No. 10. In her letter, she specifically mentions accommodation. So to the extent they try to argue "We didn't know this is religion, we didn't know this is a religious accommodation under the law," accommodation is, as I'm sure you can tell, a unique word. It's a unique word under federal law when you're dealing with an employee asserting rights. That word, in and of itself, in an email from an HR person to HR managers should have been a huge red flag. It should have been a call to action to the employer. It was zero. So that is important to consider in that context.

Then we go to the retaliation claim, which is the third claim in the case. We know that Ms. Barton made her request. We've already been through that. Exhibit No. 10 lays it out pretty clearly. The testimony, there was no

dispute that she came in January and talked to her supervisors.

Number 2: Metro knew that Ms. Barton made that request. Of course they did. Ms. Barton kept her emails, thank goodness. So she had that, and she could explain that. So they knew that she made that request. Thereafter, Metro did not return her to the ERC. We know that happened.

And then No. 4, because she made a request for religious accommodation. We know that's the reason why because in her transfer letter, she says "This is the reason why I have to transfer. My request was denied." So I think that that's pretty clear, doesn't require a lot of explanation one way or the other.

We also know that when we're talking about retaliation, you're talking about a lot of things that happened. She wasn't allowed back to her job. She came back and worked for that period of time in HR after she filed her EEOC charge, how she lost hope after that because she felt like they were ignoring her. We know -- one of the things that we do know is both Judith and Jessica testified that they're no longer in the department. They transferred out of the department.

So that begs the question -- I bring that up because that begs the question -- there obviously have been open spots in the ERC since Carol Barton left. If this were

all just a bunch of nothing, why wouldn't you bring back your most valuable employee, who they all said was the most knowledgeable? Why wouldn't you do that? Retaliation is why. Because sometimes the most obvious answer is the answer. She was still in the sub department. She was still plugging away. And they knew she was. They knew that she wanted to come back.

So we're going to talk just briefly about the evidence that shows Metro got it wrong in their defenses. We talked about the hardship. You can't blame Carol for your bad choices. They created this hardship. So, you know, that is a very important consideration when they're trying to say that they've met their burden to show that it would have been an undue hardship. They haven't met it because they created the hardship. And it's easy to say that it's a hardship when you don't even know your obligations under the law, when you're not following the law from the get-go.

So it is important. A vacation freeze is not a freeze on someone's civil rights. It's not a freeze on someone's religious rights. You can't make up a policy internally that supersedes federal law. That's the bottom line. And then package it as a vacation freeze and continue to de-minimize someone's religion because that's what that is. They say, "Well, the FMLA is different. Medical leave is different." Is it? It's not. Like I explained earlier,

two federal laws. Supposed to protect employees. Didn't. Didn't protect Carol. They also try to turn it around and say "Carol gave us the ultimatum." They ignored testimony that Ms. Few was the first one to suggest she go to another department. What's Carol supposed to do? The manager of the department is basically saying get out. That was Carol's testimony, and I remember it because she said "I about fell out when she said that." I would have too. It's incredible that she would have said that.

But then blame Carol again for doing what she had to do and what her rights were. So I'm going to touch briefly on the harms and losses.

Judge, am I okay for time?

THE COURT: You're approaching your 30 minutes. So I would keep it succinct.

MS. COLLINS: I will. All right, the harms and losses in the case, compensatory. The judge will read you instruction about compensatory damages, and you take into account -- you balance the harms for inconvenience, for mental anguish, loss of enjoyment of life. You take into account the little things. Sadness she experienced, blood pressure, loss of trust and hope, the inconvenience. She was in a regular full-time job where she didn't worry about benefits. She didn't worry about retirement. She had a stable job with government. It's about the most stable job

typically there is.

Now she's in a position where she basically has to pick up shifts. She has to check her phone or her email every day to see if she's going to work, to see if somebody's asked her to be a substitute. That's inconvenient. She left from a job that was a permanent job where she went into her office every day. Now she's going around to different schools, different kids of all ages, making about half what she made, $12 an hour. I would say that is the definition of inconvenient.

And I also want to just ask you to look at Exhibit No. 15 again. That's the email where Carol memorialized that she was going back to work and help her co-worker in the HR Department and fill in for her when she was in FMLA, when she was on FMLA. I think having to swallow your pride and come back to hope that they would return you and do the right thing, that meets the definition of inconvenience.

You also can consider how her husband Kenn's testimony -- the sadness that he witnessed, how her kids noticed her change in demeanor, and how it was hard to get out of bed. And I'm going to go briefly through the verdict form.

We went through the elements of the case. This is what the verdict form is going to look like. Do you find that Metro discriminated against Ms. Barton? Yes. Do you

find that Metro failed to accommodate Ms. Barton's religious observance? Yes. Do you find that Metro retaliated against Ms. Barton in violation of Title VII? Yes.

The next page, what amount of compensatory damages should be awarded to Ms. Barton? I'm asking you to fill in $350,000, but that's up to you-all. That's the part -- now that you-all finally get to talk about the facts of the case, you fill that in to what you feel is appropriate.

So ladies and gentlemen, thank you for your time. At the beginning of the case, I told you large employers, especially big cities, like Metro Government, have a responsibility to know the law, not discriminate against people like Carol Barton when they make reasonable requests to adhere to their faith. They have a responsibility to find out the facts, to not make decisions based on fear and make the wrong choice, which is what they did.

In this case, we've shown you that there's evidence Metro violated this fundamental responsibility to a hard working, loyal and seasoned employee. When it did, it violated her civil rights to practice her religion by forcing her to make an impossible choice, her job over her faith. Because they did this, we ask you to return a verdict in Ms. Barton's favor and award her full and complete damages associated with their violations in an amount of no less than $350,000.

Thank you so much for your time.

MR. FOX: Ladies and gentlemen of the jury, the plaintiff and the plaintiff's attorneys are trying to make something much larger out of this issue than it really is. It is really quite simple. Like I said in my opening statement, it was really pretty simple. Everyone knew that this was the busiest time of the year for the ERC, and the ERC, the Employment Resource Center, has about five, six or so employees. There were a couple of employees, Ms. Earnest and Ms. Hawkins especially, who said, well, the busy time was April and maybe even September, but they were saying, I don't know, I guess. You may have written that down during the time that they were saying, I don't remember for sure, it was about this time, but if you listen to the testimony of the managers, the ones who make the decisions about leave time, Lisa Few and Ms. Harris, they both pinned down and they showed -- and we showed that -- we had explained this to opposing side as far back as March of 2021 that the freeze itself -- the leave, vacation freeze itself was mid-June until the beginning of the next school year, beginning of August.

But even so, there's no rebuttal, there's been no dispute here, whatsoever, that the leave time that Ms. Barton was asking for was right smack in the middle. It overlapped June, over the July 4th holiday and into July. It was 17

calendar days in a row. There's been -- I think everyone's in agreement, even Ms. Barton, that's the very busiest time of the year. And the reason I said Ms. Barton even is because you might recall in Exhibits 11 and 13, where her -- her own statements where she specifically talks about how "It is with a heavy heart that I submit this letter of transfer from the Human Resources Department to the Substitute Department. The decision was not taken lightly, as I totally understand the ERC workload during the summer break, as I have worked it for the past 12 years." So there, keep in mind, those are her words. She acknowledged, she knew this was the busiest time of the year.

And even here, this letter of June 2018, she says "Due to the fact that the summer is our busy time, I am not approved to go. With that being said, I have to take this once in a lifetime journey." So I'm honing in on "due to the fact that the summer is our busy time, I'm not approved to go." So keep in mind, this is before all the lawyers got involved, before there was a lawsuit, before there was any testimony, before there was a trial, back in June 2018, these are her words, and you'll see that she knew that this was the busy time of the year, and the reason her leave was denied was because it's the busy time of the year.

That's what she said. It wasn't motivated because of her religion or anything like that. It was a simple

denial because they said, "Carol, this is our busiest time of the year. You know that. We have this vacation freeze in place." And by the way, vacation freeze is what they call it, but as you heard the testimony, it was just a blackout on leave period time during that season because that's the busiest time of the year for the ERC, mid-June to the beginning of August.

And so that was Carol Barton's own understanding of it. Everyone understood that that was the busiest time of the year. That's what this case is about, is that that's just not something that an employer should have to accommodate, that it was required to accommodate under federal law.

And Ms. Collins just a moment ago showed you some of the instructions, and the Judge will instruct you in a few minutes about hardship. And she showed you in this -- like I said, the judge will instruct you as well in a few minutes -- (as read): If an accommodation request from an employee were to cause anything more than an insignificant trifling or negligible effect on the employer's business, then it is considered an undue hardship.

And you heard the testimony multiple times. You know, lawyers kind of get criticized, why do they say the same thing over and over and over. Well, it's because we wanted you to hear it from multiple witnesses that this -- we

knew in advance, as the request is being made -- Selina Harris and Lisa Few both knew -- that for you to make this -- take this leave, Carol, we're going to have to disburse your work among everyone else and us, and we just can't do that to everybody. We can't put that kind of burden. And the federal law does not require that everyone else in the office, the other five or so employees, plus the managers, all must take on that burden. That's considered more than trifling. That's more than negligible. That's a significant burden on everyone to have to take on that work. There's nothing in the federal law that requires that.

I want to hit on a couple of points that Ms. Collins made. She referred to her transfer. And that's true. The accurate way to refer to it is it was her idea, it was Ms. Barton's idea, it was her transfer. This might be a different case if for some reason an employer didn't like a request and transferred the plaintiff away, it was the employer transferring someone. That's not what happened, as you saw -- heard the testimony and saw the exhibits here. Ms. Barton decided I'm going to go on this, it was a voluntary decision on her part. You heard her and her husband both say that she applied for this leave, she applied for this to become a delegate, that she wanted to. There were other conferences that had come available, but this one was in Sri Lanka, and that's why she wanted to go to it.

That was what she was doing because she wanted to go on that.

And then -- but it was right in the middle of the heavy time for the summer for the ERC, and she was going to be 17 calendar days. The leave was denied, and she decided she wanted to go on it anyway. So that's why she transferred to the substitute office. They referred to an ultimatum. Ask yourself when you go back and look at these exhibits, look at what -- her words at the time, June 2018, or even back January and April 2018, any of her emails. Where does it say anything about an ultimatum? Where does it say anything -- words to that effect? It's not there. Instead, she says things like she -- that she voluntarily wants to transfer. "I want you to be aware that next Wednesday June 20th, at noon, will be my last day in the HR Department." That's Exhibit 13. Exhibit 11, again, "It is with a heavy heart that I submit this letter of transfer from the Human Resources Department to the Substitute Department." It was her decision.

And you heard testimony from Ms. Few, Lisa Few, say, "Carol, we don't want you to go." And to this day, she's still a valuable employee. She's still -- she and her husband are both employed with the school system. There was never any kind of hard feelings here. It was just strictly a matter of we couldn't afford this time off. It's not something that the employer is required to accommodate. It

was going to put such a burden on the co-workers and the management.

Now, Ms. Collins, a few moments ago, was critical of the management at ERC because they didn't consider her religious request, that they just lumped it all together with a vacation request. Well, that defeats her case here, the religious discrimination. It must be some decision that Metro made because of her religious observance, because of her religion, that that's why we made the decision. And you've heard Ms. Collins say that they didn't consider -- well, that's right, it wasn't any kind of motivating factor in what was done here. It wasn't because of her religion. It was because of the heavy workload, and she was going to be off so long. That's why they made that decision to deny her request.

Ms. Collins wants to also try to convince you that, well, there was this decision to transfer her. She sort of implicitly says it was Metro's decision. It has to be the employer's decision to do something, but as I just hit on just a few moments ago, it was her decision to voluntarily leave. Also, Ms. Collins is critical because we treat medical issues differently. It's like we -- we heard the testimony. That's just apples and oranges. It's completely different. A medical issue is completely different, handled by a completely different set of rules and regulations, and

something to be handled through the benefits office.

You know, if someone has cancer treatment or something, and they need to be out several weeks, that's just completely different than voluntarily applying to be a delegate to go to this event in Sri Lanka. And we're not doubting any kind of religious faith on behalf of Ms. Barton at all. That has nothing to do with it. It's just as an employer, we have to treat -- medical issues are just completely different.

Then there's this issue about something about why wouldn't we let her come back. She could have come back at any time. In fact, the proof was, when she left -- as soon as she did come back to the substitute office, she immediately worked for HR filling in, making the same rate of pay, $22 an hour -- and that's in the evidence, in the proof -- filling in for someone who was out on medical leave. She came right back to HR. She could have come back at any time. In fact, Ms. Collins even said obviously there were open spots in ERC, and that's true. You've heard about the huge turnover. It's a lot of work, and it's heavy work. And so there is heavy turnover.

Ms. Barton, like I said, is still in -- is still a Metro employee. She's still here. If there's all these open spots, where's the proof that, hey, here's an open spot in the ERC, I applied for it, and I was denied it. I

interviewed for it, and I was denied it. There's no proof like that. The only thing you've heard from her is her own belief that, well, they didn't want me back. That's not proof of anything. What would be proof -- this might be a different case if she said, yeah, here are these positions with the ERC. I applied for them, and then I interviewed with Ms. Few, or interviewed with the manager there, and they denied me. That would be proof of some type of not allowing her to come back. She could come back at any time. You even heard Ms. Few say, "Carol, I don't want you to go." There was no ill will. She's a 12-year veteran employee. She was good at this job. We did not want her to go. She could have come back. She could have come back at any time.

So to run through the instructions that you'll get in a few minutes again. For religious discrimination, it's -- like Ms. Collins said, it's intentional discrimination, where they intended to discriminate against her because of her religion, because of her religion. That's not what happened here.

Religious accommodation, if I can line it up correctly. Religious accommodation. For this one, failure to accommodate, she has to show that she was discharged or disciplined. You might recall, I specifically asked Ms. Barton on the stand "Where's the termination letter in all this?" And she said, "Oh, it was not because I wasn't

terminated."

Discipline. There's no proof of discipline. In fact, we asked Ms. Few about that. Was there any discipline over this? Was there any kind of write-up or reprimand or any form of discipline? No, there's no discipline at all. So that claim fails there as well.

Even if she had shown something like that, which, of course, she didn't, then the burden shifts back to Metro to show, well, the reason we took this action is because it was going to cause an undue hardship, it was anything more than insignificant, trifling or negligible effect on the office.

And then, again, retaliation is this heading C. Primarily what I want to draw your attention to is that Metro did not return Ms. Barton to the ERC, and Metro decided not to return Ms. Barton to the ERC. Those facts aren't in evidence. That did not happen. Like I said before, for her just to say, well, I kind of felt blackballed, or I felt like they wouldn't want me back, that's not proof of anything. To prove something like this, you would have the applications because, just as Ms. Collins said, obviously there were open spots available. Ms. Barton to prove this would show, look, yeah, there were these open spots. Here is my application. I applied for it. I interviewed. They considered me, and I didn't get any of these positions. I've tried again and

again and again. That's just not the case. And like I said, as soon as she came back from Sri Lanka, she worked right in HR again. HR is the umbrella over the ERC. She worked in HR again anyway. She could have come back at any time if she had just applied for one of those positions.

So when you go back and deliberate, imagine yourself being the manager over this small office, five, six employees, where it's well-known that there's a busy season. The school teachers' busy season is during the school year. They have a break during the summer. ERC, it's flipped around. They have maybe a little bit more of a break where they can take extended times off during the school year, but their busy season is in the summer. Ms. Barton's time off was right in the middle of summer. So imagine if you're the manager, and you've got this office of five or six employees. What would you do? Of course you would say "That's going to put us in such a bind for you to be off 17 days. You know this is the policy. Please don't -- please don't do this. We can't allow you to be off for 17 consecutive days, 12 business days. We can't give this 12 business day leave right in the middle of our busiest time."

It's up to you all. Don't let this be the standard that the federal government is telling employers here that that's the standard, that this must be accommodated, this has to be accommodated under federal law.

That's just not the law. Don't let that be the standard.

And because of that, then Dr. Baum's report you may disregard. I like Dr. Baum a lot. Like I said, I've worked with him on another case. I hired him in another case. He's fantastic at what he does. But he wasn't asked to do what you're doing. He wasn't asked to look at federal law. I asked him that, and he says, "Yeah, that's not my -- that wasn't what I was asked to do." He just looked at the numbers, you know, in case -- in the event that, as Ms. Collins wants to argue, if she wins, well, then these numbers would apply, but you may disregard that because this is not the standard. This is not -- there's nothing here that we did that was a violation of federal law.

So on the verdict form, like I said, they're trying to break this into three claims. It all arises out of the same claim. Please check "No," "No," "No," and sign it and submit it to the court officer.

This is not the standard under federal law. This was Lisa Few, Selina Harris working with a small office. This is absolutely within their right to deny this extended leave time for whatever purpose because it was during the -- right in the hottest -- busiest time of the year, and it would have put such a burden on their fellow employees and also on the managers themselves. And we know that to be true because when she quit the ERC and went on to the extended

religious convention anyway in Sri Lanka, the proof is in the pudding. They did have to step up. They did have to work nights and weekends. And not just midnight -- while weekends, but also midnight, 1 or 2 in the morning. That's just not the standard. The employer should not have to be required under federal law to do that.

Thank you.

MS. COLLINS: With respect to Dr. Baum's testimony, the Court will instruct you in this back pay instruction, that was put into evidence because the Court says "I will." That means the judge. So Dr. Baum testified for the judge. So he will deny -- he will consider that issue of pay. That's what that means. It's not that his testimony doesn't matter, because it does. It's important. And when you-all check those three boxes that discrimination occurred, the judge will definitely use Dr. Baum's testimony.

There are a few things that I wanted to touch on that I think were incorrect statements. I felt like just a moment ago Metro continues to ignore federal law. They continued to urge you as a jury to put yourself in the place of deciding how federal law should be applied the same way they did. And that's ignoring it. And that's wrong.

So what we're asking you to do is read these jury instructions that the Court is going to give you and follow the law. Follow the law. That's all we're asking you to do.

We also acknowledge, yes, it was a busy time of year. Carol acknowledged that. That's in the emails. That's why she started this process in January, started the process in January, and they did nothing. It was telling when he said "We can't put that kind of burden on everyone." That word "can't" is telling. Can't or won't?

They didn't want to do their job. They didn't want to follow federal law, and they didn't want to take the steps that were necessary to make sure the workload was covered. And then they complained about it at the end of the day. That's what happened. So . . .

He also pointed out those two words "discipline" and "discharge." Carol's not in her job anymore. I don't know how much more clear that definition is, but not being in your job anymore meets that definition. They also complain that her not being back in the ERC is her fault. She's in the sub department. The very definition of that department is to bring people like Carol in to where they're needed. They did that once. They knew they could do it again. They knew they've been able to do it like that the whole time. They haven't done it. That's why she went to the sub department. She testified about that. She went there in the hopes that they would pick her up, that they would bring her back to HR. That is retaliation, ladies and gentlemen.

They also say that the actions that they took were

not because of religion. Ladies and gentlemen, that's why we're here today. Carol Barton's religion is the reason why we're here today. Title VII says that she could do what she did and not be ignored, not be told no out of hand and then blame her to this day for their violation of the law.

Ladies and gentlemen, thank you for your time. We ask you to return a verdict in favor of the plaintiff. Thank you.

THE COURT: All right, members of the jury, you've now heard all the evidence in the case, as well as the closing arguments. Now it is time for me to instruct you about the law that you must follow in deciding this case.

I will start by explaining your duties as jurors;

Then, I will explain certain principles of law;

Then, I will explain certain general rules that apply in every civil case;

And last, I will explain the rules that you must follow during your deliberations in the jury room and the possible verdicts you may return.

Please listen carefully.

You have two main duties as jurors. The first is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the

facts in any way.

Your second duty is to take the law that I give you and apply it to the facts. It is my job to instruct you about the law, and you are bound by the oath you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before and during the trial and these instructions. All the instructions are important, and you should consider them together as a whole.

The parties have talked about the law during their arguments, but if what they said is different from what I say, you must follow what I say. What I say about the law controls.

Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

The term "preponderance of the evidence" means the amount of evidence that causes you to conclude that an allegation is probably true. To prove an allegation by a preponderance of the evidence, a party must convince you that the allegation is more likely true than not true.

Preponderance of the evidence means, simply, the greater weight of the evidence. It may be helpful to envision a set of balancing scales. If you find that the evidence on a particular issue is equally balanced, that

issue has not been proven by a preponderance of the evidence, and the party having the burden of proving that issue has failed. On the other hand, if you find that the evidence on a particular issue tips the scales, be it ever so slightly, in favor of the party with the burden of proof, then that element will have been proved by a preponderance of the evidence.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

In this case, Ms. Barton brings three claims under Title VII of the Civil Rights Act of 1964, which will be referred to in these instructions as Title VII.

Ms. Barton claims that Metro discriminated against her because of her religion, refused to accommodate her religious observance, and retaliated against her in violation of Title VII. Metro denies that Ms. Barton was discriminated or retaliated against in any way.

Title VII prohibits employers from discriminating against an employee in the terms and conditions of employment because of an employee's race, color, religion, sex, or national origin. Title VII requires employers to make reasonable accommodations for the religious observances of

their employees, short of incurring an undue hardship. Title VII also prohibits employers from retaliating against an employee for engaging in activity protected by Title VII.

I will now instruct you more fully on the issues you must address in this case.

Ms. Barton claims that she was adversely affected in her status as an employee of Metro because of her religious observance. Specifically, Ms. Barton claims that she was forced to transfer to a job with lesser pay and benefits by Metro because of her religious observance. Metro denies that Ms. Barton was discriminated against in any way.

For Ms. Barton to prevail on this claim against Metro, Ms. Barton must prove by a preponderance of the evidence that her religious observance was a motivating factor in Metro's decision.

In showing that her religion was a motivating factor in Metro's decision, Ms. Barton is not required to prove that her religious observance was the sole motivation or even the primary motivation for Metro's decision. Ms. Barton need only prove that her religious observance played a motivating role in Metro's decision, even though other factors may have motivated Metro.

Ms. Barton claims that Metro failed to accommodate her religious observance, in violation of Title VII. Metro claims that Ms. Barton's requested religious accommodation

would have imposed an undue hardship on Metro's operations.

For Ms. Barton to prevail on this claim against Metro, she must prove each of the following elements by a preponderance of the evidence:

One, that Ms. Barton holds a sincere religious belief that conflicts with an employment requirement;

Two, Metro was aware of the conflict; and

Three, Ms. Barton was discharged or disciplined for failing to comply with the conflicting employment requirement.

If you determine that Ms. Barton has proven each of these elements by a preponderance of the evidence, then you must find for Ms. Barton on this claim unless you determine that Metro has proved that it was unable to allow Ms. Barton to attend her religious observance without undue hardship on Metro's operations.

If an accommodation request from an employee were to cause anything more than an insignificant, trifling, or negligible effect on the employer's business, then it is considered an undue hardship.

Ms. Barton claims that Metro retaliated against her because she made a request for a religious accommodation. Metro denies that it retaliated against Ms. Barton. For Ms. Barton to prevail on her retaliation claim, she must prove each of the following elements by a preponderance of

the evidence:

One, Ms. Barton made a request for a religious accommodation;

Two, Metro knew that Ms. Barton made a request for a religious accommodation;

Three, thereafter Metro did not return Ms. Barton to the ERC; and

Four, Metro decided not to return Ms. Barton to the ERC because she made a request for a religious accommodation.

For the fourth element, you need not find that the only reason for Metro's decision was Ms. Barton's request for a religious accommodation, but you must find that Metro's decision to not return Ms. Barton to the ERC would not have occurred in the absence of, or but for, Ms. Barton's having -- Ms. Barton's having made a request for a religious accommodation. A "but for" standard simply means a defendant cannot avoid liability just by citing some other reason that contributed to its decision.

If you find that Metro violated Ms. Barton's rights under Title VII, then you must determine an amount that is fair compensation for Ms. Barton. These damages are called compensatory damages. You may award compensatory damages only for damages and losses that Ms. Barton proves were caused by Metro's illegal conduct.

The damages you award must be fair compensation, no more and no less. You may award damages for any future pecuniary losses or any emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life or other nonpecuniary losses Ms. Barton experienced or will experience as a consequence of Metro's discriminatory or retaliatory conduct. No evidence of the monetary value of such intangible things, such as pain and suffering, has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make should be fair in light of the evidence presented at trial.

In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation or guesswork. On the other hand, the law does not require that Ms. Barton prove the amount of her losses with mathematical precision, but only that -- with as much definiteness and accuracy as circumstances permit.

If you find that Metro violated Ms. Barton's rights under Title VII, I will determine separately whether Ms. Barton is entitled to any back pay to compensate her for any wages she may have lost because of Metro's actions. If I

find that Ms. Barton is entitled to back pay, I will also determine the amount of any such back pay. If you decide to award Ms. Barton compensatory damages, you must not include any amount of back pay in the amount you award as compensatory damages.

You must make your decision based on the evidence that you saw and heard here in court. Do not let rumors, suspicions or anything else that you may have seen or heard outside the Court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits I've allowed into evidence, and any facts to which the lawyers have agreed or stipulated.

Nothing else is evidence. My legal rulings are not evidence. My comments and questions are not evidence. The opening and closing statements are not evidence. Questions asked by lawyers of witnesses are not evidence.

During the trial, I did not let you hear the answers to some of the questions that were asked. You must completely ignore those questions. Do not even think about them. Do not speculate about what a witness might have said. They are not evidence, and you are bound by your oath not to let them influence your decision in any way.

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience

with people and events and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you're free to reach that conclusion.

I now want to discuss the terms "direct evidence" and "circumstantial evidence."

Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that will be circumstantial evidence from which you could conclude that it was raining.

It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one. Neither does the law say that one is in any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

For the limited purpose for which any evidence has

been received, you may give it such weight as you feel it deserves. You may not, however, use such evidence for any other purposes not specifically mentioned.

The parties have agreed or stipulated that certain facts are true. Therefore, you must accept these facts as proven.

The plaintiff has submitted information through "requests for admissions." A request for admission is a written statement of fact submitted by one party prior to the trial to the opposing party. You should treat the facts admitted in these statements as having been proven for the purposes of this case.

During the course of the trial, you have heard reference made to the word "interrogatory." An interrogatory is a written question that must be answered under oath in writing. You are to consider interrogatories and their answers as if the questions had been asked and answered in court.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all the evidence as true or accurate.

You are the sole judges of the credibility or believability of each witness and the weight to be given to that witness's testimony. In weighing the testimony of a witness, you should consider the circumstances under which

each witness has testified. Consider the witness's manner of testifying and the opportunity to observe or acquire knowledge concerning the facts about which the witness testified. Consider the witness's candor, fairness and intelligence to the extent to which the witness has been supported or contradicted by other credible evidence. Consider also any relationship which the witness may have to the plaintiff or the defendant; how the witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

If you believe that any witness has been so

impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, that you may think it deserves.

Discrepancies in a witness's testimony or between his testimony and that of others do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mis-recollection is not uncommon. It is also possible that two persons witnessing an incident or a transaction may see or hear it differently. Whether a discrepancy pertains to a fact of importance or only a trivial detail should be considered in weighing its significance.

Usually, witnesses are not permitted to testify as to opinions or conclusions. However, a witness who has scientific and technical or other specialized knowledge, skill, experience, training, or education may be permitted to give testimony in the form of an opinion. Those witnesses are often referred to as expert witnesses.

You should determine the weight that should be given to each expert's opinion and resolve conflicts in the testimony of different expert witnesses. You should consider:

The education, qualifications, and experience of the witnesses; the credibility of the witnesses; the facts relied upon by the witnesses to support the opinion; and the

reasoning used by witnesses to arrive at the opinion.

You should consider each expert and give it the weight, if any, that you think it deserves. You're not required to accept the opinion of any expert.

The law does not require a party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue in this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in this case.

You must not consider as evidence any statements of counsel made during the trial.

As to any question to which an objection was sustained, you must not speculate about the answer -- what the answer might have been or on the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that has been stricken out by the Court; such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

The lawyers objected to some of the things that were said or done during the trial. Do not hold that against either side. They have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial. Do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

Remember also that any statements, objections or arguments made by the lawyers are not evidence in the case. Lawyers try to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A governmental entity, like Metro, is entitled to the same fair trial at your hands as a private individual such as Ms. Barton.

That concludes the part of my instructions explaining the rules for considering the testimony and evidence. Let me finish up by explaining some things about your deliberations in the jury room and your possible verdicts.

The first thing that you should do in the jury room is choose someone to be your foreperson. You may select the foreperson in any fair and reasonable way. The foreperson shall preside over your deliberations and speak for the jury in the courtroom when you've reached your verdict. The case should not be decided simply on what the foreperson wants. You must each exercise your independent judgment. The foreperson's opinion carries no more weight than any other juror's opinion.

Once you start deliberating, do not talk to the court security officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, the foreperson must write them down on a piece of paper, sign them, and give them to the court security officer. The court security officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you've asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson and must be in writing.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. That should stay secret until you are finished.

Remember that you must make your decision based only on the evidence that you saw and heard here in court. You may consider the exhibits admitted into evidence. Do not try to gather any information about the case on your own while you are deliberating.

For example, do not do any internet searches about the case, do not conduct any experiments inside or outside of the jury room, do not consult any books to help you with your deliberations, and do not conduct any independent research, reading, or investigation about the case. You will be permitted to take with you any notes you may have taken during the course of the trial.

During your deliberations, you must not communicate with or provide any information to anyone by any means outside -- I'm sorry, about this case. You may not use any electronic device or media, such as a smartphone, computer, the internet, or any text or instant messaging service, any internet chat room, blog, or any social media website such as Facebook, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until the Court accepts your verdict. In other words, you cannot talk to anyone,

correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations.

Make your decision based only on the evidence that you saw and heard here in the Court.

Your verdict, whether it is for the plaintiff or for the defendant, must be unanimous. In other words, every one of you must agree on the verdict.

After you reach a verdict, and it is announced in the courtroom, I will ask each of you if it is, in fact, your verdict. This is to make sure the verdict is, in fact, unanimous.

I now want to explain the verdict form to you. You will be provided one copy for use in your deliberations. The foreperson should complete and sign the verdict form when you reach your verdict.

Certain questions have instructions written before or after them. It is very important to follow these instructions carefully. These instructions tell you which questions must be answered, or skipped, based on your answers to previous questions. Please carefully read and follow the instructions on the verdict form.

Please remember the Court has no opinion on how you should decide the case.

I will now read the verdict form to you.

The verdict form contains a number of questions.

Question 1: Do you find that Metro discriminated against Ms. Barton in violation of Title VII?

There's a blank for you to check "Yes" and a blank for you to check "No."

Question 2: Do you find that Metro failed to accommodate Ms. Barton's religious observance in violation of Title VII?

Again, there's a blank for "Yes" and a blank for "No."

Question 3: Do you find that Metro retaliated against Ms. Barton in violation of Title VII?

There's a blank for "Yes" and a blank for "No."

And there's an instruction.

If you answered "Yes" to questions 1, 2, or 3, proceed to question 4. If you answered "No" to all the above questions, skip the remaining question and have the foreperson sign and date the form.

Question 4: What amount of compensatory damages should be awarded to Ms. Barton?

There's a blank for you to write in the amount of damages.

Then there's an instruction to please sign and date this form and return it to the Court. And there's a blank for the jury foreperson to sign the form and a separate

blank for the foreperson to date the form.

Now that you have all -- now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk about -- talk with each other about the evidence and to make every reasonable effort you can to reach a unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you're convinced that other jurors are right and that your original position was wrong.

But do not ever change your mind just because the other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that, your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

Listen carefully to what the other jurors have to say, and then decide for yourself if the plaintiffs -- if the plaintiff has proved her claim against the defendant.

Let me finish by repeating something I said to you

earlier. Nothing that I have said or done during the trial was meant to influence your decision in any way. You decide for yourselves whether or not Ms. Barton has proved her claims against Metro.

If I could have counsel approach, please.

(Bench conference outside the hearing of the jury:)

THE COURT: All right, I've now read the charge. Other than objections raised in the charge conference, which are preserved, are there any other objections to the charge I've just given from the plaintiff?

MS. COLLINS: No. I noted three mistakes, but they were all synonyms. Do you want me to let you know which ones they were?

THE COURT: Sure.

MS. COLLINS: On page 5, you said "Played a motivating role," rather than part. That's a synonym. You asked.

THE COURT: No, I'm laughing at myself because I can sit and see a word right on the page in front of me and say something different. It happens. Okay, I think -- I'm not going to correct that. There's also a typo after that.

MS. COLLINS: Okay. It's a synonym. Page 7, "By citing some other factor." You said, "Reason." I think they mean the same.

THE COURT: Okay.
MS. COLLINS: And this is minor again. Page 12, instead of "as," you said "that."
THE COURT: Which one?
MS. COLLINS: At the very bottom of the page, the third sentence. Means the same.
THE COURT: So I said "that"? Okay.
MS. COLLINS: That was it. Everything else is . . .
THE COURT: All right. Those are all synonyms, so --
MS. COLLINS: Well, you left out a "now," but that . . .
THE COURT: Okay.
MS. COLLINS: Sorry.
THE COURT: No, I'm glad you're reading carefully. I don't think that those would require me to go back and clarify.
MS. COLLINS: No.
THE COURT: I think that the meaning is the same. Any objections from Metro?
MR. FOX: No objections from Metro.
THE COURT: Okay. Thank you.
(Bench conference concluded.)
THE COURT: All right. Thank you for your service

as jurors. We'll gather the exhibits and deliver them to you. You may begin deliberating once you have all the exhibits.

You should take the time needed to deliberate fully. And please remember that you should deliberate only when each juror is present. Also, if you're deliberating as we approach 4:30, we will reach out to see -- to you to see if you would like to take a break for the day or continue your deliberations.

Please leave your copy of the jury charge and the verdict form on your seat. We will have a copy back there for you, one copy. And you can step back to the jury room, and the Court will be in recess for the purpose of jury deliberations.

You can take your notes with you, just not the charge and the verdict form.

(The jury was excused from the courtroom at 12:49 p.m.)

THE COURT: All right, be seated, please. Please just have a number -- Jill's pinch-hitting for Angie right now, but have a number with us. Try to be on about at least a 10- or 15-minute tether. You don't have to stay in the building if you don't want to, but -- you-all have both heard this joke before, but as Todd Campbell used to say, now is not the time to go check your dry cleaning in Green Hills.

So just stay fairly close. You may have places to go and park while we're waiting that aren't in the building, and that's perfectly fine, but just try to be able to be back in that sort of timeframe in case we get a question or a verdict.

And so we'll just wait, and we'll let you know if and when we hear something.

(Recess taken from 12:53 p.m. to 1:45 p.m.)

THE COURT: All right, we received a note from the jury saying they've reached a unanimous verdict. So we'll bring them in and hear what that verdict is.

(The jury returned to the courtroom at 1:48 p.m.)

THE COURT: All right, be seated, please. Members of the jury, I understand that you-all have reached a verdict. Is that the case? And, [redacted], are you the foreperson?

JUROR: I am.

THE COURT: All right, if you'll hand the verdict form to our court security officer, please.

All right, I'll now read the verdict form in Carol Barton, plaintiff, versus Metropolitan Government of Nashville and Davidson County, defendant, Case No. 3:20-cv-118.

The verdict form is as follows:

Question 1: Do you find that Metro discriminated against Ms. Barton in violation of Title VII?

Answer: No.

Question 2: Do you find that Metro failed to accommodate Ms. Barton's religious observations in violation of Title VII?

Answer: No.

Question 3: Do you find that Metro retaliated against Ms. Barton in violation of Title VII?

Answer: No.

The jury followed my instructions and did not complete question 4 in light of their answers to questions 1, 2, and 3.

If I could have our court security officer publish this to the attorneys, I will individually question the jurors.

All right, I'm going to ask each of you if the verdict I just read is, in fact, your individual verdict as well.

[redacted]?

JUROR: Yes.

THE COURT: [redacted]?

JUROR: Yes.

THE COURT: [redacted]?

JUROR: Yes.

THE COURT: [redacted]?

JUROR: Yes.

THE COURT: [redacted]?
JUROR: Yes.
THE COURT: [redacted]?
JUROR: Yes.
THE COURT: [redacted]?
JUROR: Yes.
THE COURT: And [redacted]?
JUROR: Yes.
THE COURT: All right, having polled the jury, I find that the verdict is, in fact, unanimous.
Is there any reason from counsel that we cannot dismiss this jury in this case from plaintiff?
MS. COLLINS: No, Your Honor.
THE COURT: And Mr. Fox?
MR. FOX: No, Your Honor.
THE COURT: All right. Members of the jury, again I want to thank you for your service. We moved the trial faster than we had hoped, but you-all were attentive and were here when you needed to be here, and for that, we're grateful. As I said on the first day, if we didn't have people like you show up for jury duty, we wouldn't have the right that we all enjoy to jury trials. So, again, thank you.
If you could return to the jury room, where you've been deliberating and just hang tight for a few minutes,

we'll get you on your way as soon as possible. Thank you.

(The jury was excused from the courtroom at 1:51 p.m.)

THE COURT: All right, are there any matters I need to address before we adjourn the trial?

MS. COLLINS: Plaintiff will be filing a motion for judgment as a matter of law.

THE COURT: Okay.

MR. FOX: Nothing at this moment from Metro.

THE COURT: All right. Well, then everyone have a good rest of the day and a good long weekend.

(Proceedings concluded at 1:50 p.m.)

REPORTER'S CERTIFICATE

I, Patricia A. Jennings, Official Court Reporter for the United States District Court for the Middle District of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on November 10, 2022, in the matter of CAROL BARTON vs. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Case No. 3:20-cv-00118; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (pages 1 through 95) is a true and accurate record of said proceedings.

This the 3rd day of January, 2023.

/s/ Patricia A. Jennings
Patricia A. Jennings, RMR, CRR
Official Court Reporter